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ABSTRACT

There are three levels of potential liability involved in the specific area of school safety patrols--liability of the school district as an entity of government, liability of the individual school board member, and liability of the school administrators who supervise the school safety program. But there is no known case in a court of record in which these liabilities have been decided. There are several steps school officials can take to reduce their liability potential. The first is to secure enactment of State legislation specifically authorizing the maintenance of school safety patrols. A second step is directing a complete review of the entire school safety patrol program. Thirdly, if exempting legislation is not possible, legislation should be sought which provides for the indemnification of any school official or employee who is the subject of a judgment for damages in any action arising out of the performance of his duties. (NH)

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IS LIABILITY A FACTOR AFFECTING SCHOOL SAFETY PATROL PROGRAMS TODAY?

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by

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RATIONAL JUDGMENTS NEEDED ON POSSIBLE CIVIL ACTION

The fear of potential liability for injuries sustained by pupils, employees, or patrols is always present in the minds of school board members and school administrators. But whether it should merit all of the concern which the subject receives is quite a different question, and one to which insufficient attention has been given.

It is not difficult to ascertain the reasons for the growing uneasiness of boards of education and administrators concerning potential liability in all areas of school operations. Whether these fears are justified in the specific matter of school safety patrols or not, the imminent threat and possibility of a civil action for damages must be dealt with on a rational basis.

DOCTRINE OF GOVERNMENTAL IMMUNITY ABROGATED IN MANY STATES

The chief bulwark which school officials historically have relied upon to protect against damage suits has been the doctrine of governmental immunity. Stated simply, this doctrine held that a school district could not be sued in damages for injuries to pupils, patrols or employees arising out of the exercise of the governmental function of maintaining school district operations. As recently as 15 years ago, only four states had abrogated this defense of governmental immunity in tort actions. But in the past 15 years, there has been a rather consistent movement in the direction of abolishing the defense of governmental immunity, until at the present time, approximately half of the states permit liability suits against school districts. This change has come about as a result of both court decisions and legislation. It is not the purpose of this discussion to deal with the wisdom of this trend. But the trend is a fact, and the fear of the cost of lawsuits is ever present in the minds of school officials.

STUDY NEEDED ON EFFECTS OF ABOLITION OF GOVERNMENTAL IMMUNITY

It does not appear that anyone has carefully studied the measurable results of abolishing governmental immunity, either in terms of the number of lawsuits filed and tried, the number of cases decided adversely to the school district, the amount of damages involved in such cases, or the effect upon the cost of liability insurance. What little information is available does not suggest that the negative effects of abolishing immunity have matched the prior fears of those who have opposed the change in doctrine.

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But since the fear of the unknown is a very important factor to all of us, it is not unreasonable that boards of education should have some trepidation about the future if the doctrine of governmental immunity should be totally abolished. The reality of this fear should prompt some responsible agency to undertake a careful study in those states which have waived governmental immunity to determine what has been the resultant effect upon school operations.

INCREASING INCIDENCE OF LEGAL ACTION BY CITIZENRY CAUSES SCHOOL CONCERN

There is another reason for the concern of school officials in all areas of liability, and that lies in the increasing willingness of the general citizenry to file lawsuits against school districts, school board members, and school employees. The incidence of lawsuits against school districts has multiplied in the last decade and school officials are justifiably sensitive about potential liability. Moreover, a number of well financed organizations play a key role in filing lawsuits against school districts, asserting a wide variety of claims for damages. And when school officials read that a leading university has funded a project, the sole purpose of which is to find new ways and new bases for bringing legal actions against school districts, it is not surprising that the immediate reaction is one of great concern.

NO KNOWN RECORD OF SCHOOL LIABILITY *RE* SAFETY PATROLS

To deal effectively with this concern in the specific area of school safety patrols, the principal questions of liability which boards of education must contend with must be raised and answered. Obviously, there are three levels of potential liability involved. The first is the liability of the school district as an entity of government, the second is the liability of the individual school board member, and the third is the liability of the school administrators who supervise the school safety patrol program. *There is no known case in a court of record in which the liability of school districts, school board members or school administrators with respect to school safety patrols has been decided.* In the one case reported concerning safety patrols, the plaintiff parent of an injured child had attempted to establish a legal duty on the part of the defendant school district to maintain a school safety patrol. The court dismissed the case, holding that the decision as to whether or

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not a safety patrol was needed was solely one for the board of education to make.

Said the court: [1]

> "A statute authorizes but does not require establishment of school safety patrols to assist pupils in crossing streets . . . Nowhere does the Education Code impose upon districts a statutory obligation to supply traffic protection to pupils enroute between home and school."

Recovery of damages in liability cases is based upon the finding of negligence, either on the part of the board, the individual members of the board, or of the agents of the board, i.e., the employees of the school district. It would appear safe to assume that in those states where governmental immunity still exists, the potential for lawsuit against the agents of the board is considerably higher than it would be in those states in which governmental immunity no longer exists, and the injured party can bring legal action in damages against the governmental entity itself. Under these circumstances, the action is most likely to be brought against the governmental entity because of its superior ability to respond in damages should the civil action be successful.

Absent a showing of active and personal wrongdoing, it is unlikely that a civil action for damages would be successful against the individual members of the board of education for their decision to maintain a school safety patrol. It would require some very unusual action of the board, amounting to an active and direct intervention of the individual members of the board in the operation of the school safety patrol, to create any substantial possibility of such an action for damages.

Perhaps the fundamental question to be raised as to the board's potential liability is this: Is the simple act of deciding to maintain a school safety patrol, in which elementary school children are utilized in attempting to enhance the safety of other children in their routes to and from school, in and of itself a decision which no responsible adult would make? Robert R. Hamilton, former dean of the University of Wyoming Law School, and a nationally recognized expert in the field of school law, was an outspoken opponent of school safety patrols.

Writing in 1953 in Bi-Weekly School Law, Dean Hamilton said:[2]

> "And now we come to the sixty-four dollar question, namely, *does the entrusting of the safety of pupils to an immature child, a patrol member, of itself constitute negligence by school authorities?* Is it 'reasonably prudent' to charge a child, even one of high

[1] Wright v. Arcade School District, 230 Cal. App. 2d. 272, 40 Cal. Rptr. 812 (1964)
[2] Hamilton, R. R., Bi-Weekly School Law, Vol. III, No. 1, March 5, 1953, p. 2.

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school age, with the responsibility of conducting groups of children across busy thoroughfares? This question has not been judicially answered. That it will be answered *affirmatively* when the question arises, is a risk which school people, who operate patrols, must assume. I have the temerity to suggest that such action by school personnel is *not* 'reasonably prudent'."

The position which Dean Hamilton takes is that the board's decision to maintain a school safety patrol is negligence *per se;* that is, it is a decision which no rational adult would make, and that therefore no further negligence need be shown. Under this theory if an injury is sustained, either by a safety patrol student, or by a student being protected by the operation of the safety patrol, it is the necessary consequence of the original decision to maintain the school safety patrol. The trouble with this theory is that it overlooks the realities of the problems involved in getting children safely to and from school. Certainly it is unreasonable to suggest that the absence of *any* system would be safer than the presence of the school safety patrol. But we need to look farther to inquire whether the use of adults, for example, would substantially reduce the risk to students in those areas of cities in which students are presently used in patrol activities. It would seem that the risks involved from the inattentive driver, the drunken driver, or the speeding driver would not be substantially reduced whether the patrol was operated by a student or by an adult. A responsible student, with appropriate instruction, should be able to provide an equivalent degree of protection from these specific hazards, if indeed any protection can reasonably be afforded for these hazards.

Dr. Madaline K. Remmlein, now retired, but for many years regarded to be one of the foremost authorities on school law in the United States, took quite a different view from that expressed by Dean Hamilton:[3]

> "The purpose of the school safety patrol is to teach children safety on the streets, as well as to protect them from traffic hazards. Any modern educator recognizes that the teaching of general principles in a classroom is not sufficient, that in any area children learn best by 'doing'. School safety patrols provide a protective influence for the entire student body. The members of the patrol remind all pupils of safe practices which otherwise might be left to chance. As part of the school programs, patrols can be fully justified on the sole basis of educational values."

More recently, M. Chester Nolte has indicated that the decision as to whether a school safety patrol should be maintained is properly one

[3] Remmlein, Madaline Kinter, "School Safety Patrols Defended", American School Board Journal, June, 1957, p. 54.

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of the liability involved balanced against the educational value of the patrol itself: [4]

> "Boards must determine for themselves whether the possible educational values of patrol operation justify the risk of accident and the possible blame for injury to pupils which might result. *The complete absence of cases on this subject would seem to indicate that many boards have been justified in deciding that the educational values were worthy of the risk.*" (Emphasis supplied)

The third potential area of liability is that of the school administrator who is in charge of the program. Assuming for the moment that it has been decided that the maintenance of a school safety program is not in and of itself a negligent act, might there be some possibility or probability of liability on the part of the school administrator, arising out of the actual operation of the program? Ordinarily, the activities of administrators are confined to (1) establishing basic operating rules, (2) selecting the crossings for which the patrol is to be provided, (3) supervising the selection of individual members of the patrol, (4) supervising the training of the patrol members, and (5) supervising the day-by-day operation of the program.

The first two of the above functions are direct actions of the principal, the last three are more likely to be indirect, supervisory functions. Because of the total absence of any case law on the subject, about the only way to speculate upon the potential liability of the administrator is to reason by analogy from other types of supervisory relationships. In the field of tort law, there is a test which is applied to determine whether the defendant (in this case, the principal) exercised proper care and caution in his duty relationships with the plaintiff (here, perhaps an injured pupil). This test is ordinarily stated in the following terms: "Did the defendant exercise that degree of care which would be exercised by a reasonable and prudent man under the same circumstances?" In civil actions for damages, the jury looks at all the evidence and forms a conclusion as to whether or not the defendant's action or lack of action was proper under all of the facts and conditions present. It is suggested that this test would be modified slightly in the safety patrol question to be raised in the following language: "Did the defendant *principal* exercise that degree of care and caution which would be exercised by a reasonable and prudent *principal* under the same or similar circumstances?" Posed in this light, the jury would be asked to hear the testimony of other principals in the same area as to what type of supervision is reasonably adequate in the maintenance of school patrols. A somewhat analogous situation

[4] M. Chester Nolte, School Law for Teachers, p. 259.

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may be found in the matter of adequacy of playground supervision. The courts have held that the schools cannot be the guarantor of the safety of school children in the school setting. The degree of care which must be exercised, then, in playground supervision is that which would be "reasonable", and the test of reasonableness, as applied by the courts, is the customary practice of other schools in the same area. There is every reason to believe that the courts would apply the same type of test in determining whether or not the principal acted properly in the supervision of the safety patrol.

SUGGESTIONS FOR SCHOOL OFFICIALS TO REDUCE LIABILITY POTENTIAL

There are some specific steps which school officials can take which will reduce their potential liability for any injuries which may occur, either to school safety patrol members, or to students who are being supervised through the operation of the safety patrol.

The first step is to secure the enactment of legislation which specifically authorizes the maintenance of school safety patrols. A few states have such legislation,[5] but most of the present statutes are really inadequate to the task. A statute of this type should have at least the following features:

1. A statement of purpose which would set forth the state's policy of providing protection for school children while at the same time assisting in the teaching of student responsibility.
2. A specific grant of authority to boards of education to maintain safety patrols, coupled with authority to establish reasonable rules and regulations for the supervision and control of the safety patrol function.
3. A provision which would limit the age groups from which safety patrol children may be selected, and which would exclude certain children from participation, such as those with substandard intelligence or those with certain physical conditions such as epilepsy or poor vision.
4. A provision which would authorize any parent to have his child excluded from service on the safety patrol.[6]
5. A provision which would authorize, perhaps require, boards of education to provide insurance for the members of the safety patrol and for all supervisory officials involved in the program.

[5] A 1961 study by Walter L. Hetzel, Past-President of the National Organization on Legal Problems of Education, reported that the following states had statutes authorizing school safety patrols: Alaska, California, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, New York, North Carolina, Pennsylvania, Utah, Washington and Wisconsin.

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6. A specific statutory exemption from liability for any supervisory official in the safety patrol program, except for willful wrongdoing.

But even in the absence of such legislation, the general powers of boards of education in many states may be sufficient to authorize the promulgation of board rules and regulations, carrying the full force and effect of law, which will provide an adequate legal base for the conduct of the safety patrol program. These rules and regulations should be drawn with the care and consideration given to the drafting of a statute, and should include all of the provisions cited above, to the extent to which they may be a legitimate matter for board regulation under existing law.

It should also be pointed out that Attorney Generals in at least nine states (California, Colorado, Idaho, Indiana, North Carolina, Oregon, Pennsylvania, Washington, and Wisconsin) have issued formal opinions which uphold the legality of school safety patrols, even in the absence of express statutory authority.

A second step which boards of education should take is to direct a complete review of the entire school safety patrol program, including the selection of supervisors, the selection of student members of the safety patrol, the training of both supervisors and patrol members, the determination of the streets which are to be used and those which are not to be used, the equipment needed, the time schedule when the patrol will be on duty, the special precautions to be observed in inclement weather, etc.

If it is impossible to secure legislation to exempt school personnel from liability as suggested above, legislation should be sought which would provide for the indemnification of any school official or employee who is the subject of a judgment for damages in any action arising out of the performance of his duties. In order to secure passage of such legislation, it would probably be necessary to include an exception from indemnification in the instance of willful or reckless action by the school official or employee.

[6] See for example 79 Corpus Juris Secundum, Schools and School Districts Sec. 496, p. 445 in which it is held: "In the absence of statutory authority, a school district has no power to require pupils to serve in student patrols to protect the younger pupils at dangerous street intersections on their way to and from school". It is submitted that even with a statute, it would be sounder, from a legal point of view to provide an exemption for any parent who objects.

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SUMMARY AND CONCLUSIONS

The protection of children in their daily journey to and from the school is an important function. In the past, the proper provision of pupil protection has been the subject of intensive debate. School officials frequently take the position that it is a city matter, and city officials usually have the point of view that it is a school problem. It is not uncommon for both city and school officials to shun the responsibility because of a fear of potential liability. But a review of the law in the area reveals no case in which a school district has been held liable for an injury sustained, either by a member of the school safety patrol, or by a child under the supervision of the patrol. For this reason, it is suggested that the fears of both city and school officials may be unjustified. What might be most helpful in getting the discussion off dead center is a very careful study of the effects of abolition of the doctrine of governmental immunity. If such a study would show that the effects are not particularly significant, then school and city officials would not be so reluctant to develop adequate protective services. And this is the end which all of us would like to achieve.

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This speech was presented at the AAA School Safety Patrol Workshop at Williamsburg, Virginia, in July 1971.

Dr. Marion McGhehey is currently the Executive Director of the Kansas Association of School Boards. In addition to being the past President and current Secretary-Treasurer of the National Organization on Legal Problems of Education, he has taught a number of courses on legal aspects of school administration and has served as a Specialist in School Law for the Office of Education.